STATE OF MICHIGAN

COURT OF APPEALS

LIBERTY MUTUAL FIRE INSURANCE COMPANY, MANOR CARE, INC., and CANTERBURY VILLAGE, INC., d/b/a HEARTLAND VILLAGE SQUARE,

Plaintiffs-Appellees,

v

CITY OF GRAND RAPIDS,

Defendant-Appellant,

and

KENT COUNTY DRAIN COMMISSIONER and CITY OF KENTWOOD,

Defendants-Appellees.

UNPUBLISHED
October 25, 2005

No. 262934
Kent Circuit Court
LC No. 04-004688-NZ

LIBERTY MUTUAL FIRE INSURANCE COMPANY, MANOR CARE, INC., and CANTERBURY VILLAGE, INC., d/b/a HEARTLAND VILLAGE SQUARE,

Plaintiffs-Appellees,

v

CITY OF KENTWOOD,

Defendant-Appellant,

and

KENT COUNTY DRAIN COMMISSIONER and CITY OF GRAND RAPIDS,

Defendants-Appellees.

No. 262985
Kent Circuit Court
LC No. 04-004688-NZ

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

In these consolidated appeals, defendants City of Grand Rapids and City of Kentwood appeal from the circuit court's order denying summary disposition in this governmental immunity case. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

These cases arise from a May 15, 2001 incident in which water and sewage backup caused by rain flooded several occupied apartments in the Heartland Village Square Apartment complex[1] and caused extensive property damage.

Plaintiff apartment complex notified defendant City of Grand Rapids of the damage shortly after its occurrence. However, plaintiffs did not file this action until May 14, 2004, a day before the expiration of the three-year statute of limitations.[2] Plaintiffs alleged that defendants were liable for the damages caused by the backup under a common law "trespass-nuisance" theory and under the sewage disposal system event exception to governmental immunity, MCL 691.1417(3). Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (8), arguing that the sewage disposal system event exception to governmental immunity was not applicable because it applied to claims that arose after April 2, 2002, and plaintiffs' claim accrued prior to that date; and that, because plaintiffs' claim was not "pending" at the time of the Supreme Court's decision in *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), governmental immunity barred plaintiffs' common law trespass-nuisance claim. The circuit court denied defendants' motion, concluding that the Supreme Court did not intend to eliminate plaintiffs' common law remedy, and that this case falls within the class of "cases currently pending" under *Pohutski*.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). The governmental tort liability act, MCL 691.1401 *et seq*., provides that a governmental agency is immune from tort liability while engaging in a governmental function unless a specific exception applies. The applicability of governmental immunity is a question of law that we review de novo on appeal. *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

In *Pohutski, supra*, our Supreme Court considered whether the governmental tort liability act recognized a trespass-nuisance exception to governmental immunity. The *Pohutski* Court

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[1] Plaintiffs Manor Care, Inc., and Canterbury Village, Inc., operate the apartment complex. Plaintiff Liberty Mutual Fire Insurance Company issued a property insurance policy covering the property.

[2] See MCL 600.5805(10).

held that the statute did not recognize such an exception, and thus overruled *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988). *Pohutski*, 465 Mich at 684-690, 695, 699.

The *Pohutski* Court determined that its ruling applied only prospectively from the date of the decision, April 2, 2002, and concluded that in all currently pending cases, the *Hadfield* rule would apply. *Id*. at 695-699. The *Pohutski* Court also referred to 2001 PA 222, the legislation that created the sewage disposal system event exception to governmental immunity, and noted that the legislation did not contain any language that indicated that it was to apply retroactively. The *Pohutski* Court concluded that given the absence of any such language, the inclusion of a forty-five day notice requirement,[3] and the presumption that statutes operate prospectively, 2001 PA 222 did not apply retroactively. *Id*. at 698.

The Court stated and explained its decision:

> . . . Given the absence of any language indicating retroactive effect, the forty-five-day notice limit, and the presumption that statutes operate prospectively, we conclude that 2001 PA 222 does not apply retroactively.
>
> Thus, if we applied our holding in this case retroactively, the plaintiffs in cases currently pending would not be afforded relief under *Hadfield* or 2001 PA 222. Rather, they would become a distinct class of litigants denied relief because of an unfortunate circumstance of timing.
>
> Accordingly, this decision will be applied only to cases brought on or after April 2, 2002. In all cases currently pending, the interpretation set forth in *Hadfield* will apply. [*Pohutski*, *supra* at 698-699 (footnote omitted).]

We are compelled to reverse. Application of a statute prospectively means that the statute applies only to causes of action that accrue after its effective date. *Farris v Beecher*, 85 Mich App 208, 215; 270 NW2d 658 (1978). The flooding here occurred May 15, 2001. Thus, MCL 691.1417(3) is inapplicable to plaintiffs' claim. *Pohutski*, 465 Mich at 698-699.

Further, plaintiffs' common law nuisance claim was not "currently pending" when *Pohutski*, *supra*, was decided. By its terms, the decision in *Pohutski*, applies "to cases brought on or after April 2, 2002." *Id*. at 699. Although plaintiffs' claims accrued prior to the effective date of *Pohutski*, *supra*, plaintiffs did not bring their case prior to April 2, 2002. While there is some indication in the rationale of *Pohutski* that the Court may have intended to protect all

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[3] MCL 691.1419(1) provides that a claimant is not entitled to collect damages under MCL 691.1417 unless he provides the appropriate governmental agency with notice of the damage within forty-five days after the damage was discovered or should have been discovered.

potential claimants whose claims accrued before the statute's effective date and before the Court's decision in *Pohutski*, the holding of *Pohutski* protects a more narrow class of claimants.[4]

Reversed.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Kurtis T. Wilder

[4] Plaintiffs' request for an extension of the clear holding of *Pohutski* should be addressed to the Supreme Court.